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# JUDICIAL AND REGULATORY DECISIONS

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## THE CIVIL AERONAUTICS BOARD'S AUTHORITY TO GRANT EXPERIMENTAL CERTIFICATES

SINCE the end of the war, the Civil Aeronautics Board has granted a considerable number of temporary certificates of convenience and necessity on an experimental basis. These have been awarded under the authority of Section 400(d) (2) of the Civil Aeronautics Act of 1938.<sup>1</sup>

The authority of the Board to grant these experimental certificates has been challenged many times in proceedings before the Board and twice before courts, but so far to no avail. The Board's policy regarding such experiments was established early in a mail rate case with language which said that it would be far from the Board's intention to disapprove or discourage a reasonable amount of experimentation.<sup>2</sup> Therefore it is not surprising to find this policy in force at a later date, manifested by the granting of temporary certificates as the appropriate occasions arise.

The first challenge to the Board's authority to experiment came in 1943 when Essair sought a temporary certificate in Texas.<sup>3</sup> In its decision the Board admitted that the rendering of this local air transportation service presented a difficult economic problem and decided that the study that was being devoted to it needed to be supplemented by the accumulation of actual experience. In this way they justified the establishment of the service on an experimental basis. If the result obtained warranted it, they would then grant the carrier a permanent certificate.

The grant of this temporary certificate was challenged by Braniff Airways but the Court of Appeals for the District of Columbia approved the Board's action.<sup>4</sup> In that decision the Court said:

"(5) We find no merit in petitioner's contentions that Essair did not properly apply for a temporary certificate and that the Board has no power to issue temporary certificates for experimental purposes."<sup>5</sup>

At the present time this is the only judicial ruling directly on the point. At least three arguments can be made from this short statement. The first being, that the court didn't consider the point very thoroughly. Accepting this view would be doing an injustice to the court by impliedly accusing it of ruling on a point without proper consideration. This is an assumption that should not be made in the absence of proof. The second assumption, namely, that the petitioner's contentions were ill founded and inadequate,

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<sup>1</sup> "In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations and requirements of the Authority hereunder." Section 401(d) (2), Civil Aeronautics Act of 1938, 52 Stat. 987, 49 U.S.C. 481.

<sup>2</sup> Northwest Airlines, Inc.—Mail Rate Case, 1 CAB 275, 283 (1939).

<sup>3</sup> Continental Airlines, Inc. Et., Texas Air Service, 4 CAB 478 (1943).

<sup>4</sup> Braniff Airways v. Civil Aeronautics Board, 147 F.2d 152, (App. D.C. 1945).

<sup>5</sup> Id. at 153.

has more merit in view of the wording of the decision. However, a long answer to the petitioner's brief by the Board indicates that the question was thoroughly covered by both parties and that the court had adequate information and discussion before it upon which to base its decision.<sup>6</sup> This brings us to the third point, i.e., that the court did give thorough consideration to the question and reached the decision that the Board's position was so obviously correct that it warranted merely an affirmance on the part of the court. If this conclusion is correct it follows that the court seems to have accepted the validity of the Board's arguments on this issue more or less in their entirety for no point of disagreement with them was indicated as there was in one of the other rulings in the decision.<sup>7</sup> It is important, then, to consider briefly some of the arguments presented in the brief of the Board.

First they resolved the issue into the following question:

*"Does the term 'public convenience and necessity' as defined in the Act include the public need for temporary authorization of new, but untried, types of services?"*<sup>8</sup>

They then remarked that Congress had clearly defined the scope of their activities in the Policy section of the Act and pointed specifically to Section 2(a) and (c). The Board went on to say that, "The 'encouragement and development of an air transportation system' cannot be accomplished merely by authorizing only those types of services which are of proved worth. To do so will maintain a present system, but will not encourage and develop."<sup>9</sup> They felt that in order to encourage new types of services and at the same time to protect the public interest, "a reasonable trial period, rather than a permanent saddling of a possibly uneconomic and inefficient service on the public and on the federal treasury,"<sup>10</sup> would be the most satisfactory solution in any cases where there was a doubt as to the outcome. And thus they recognized that predictions, even though based on an abundance of substantial evidence, can be wrong.

They felt that Congress must have intended that they be able to authorize experiments and the "operation of new and untried services in an industry as new and dynamic as air transportation,"<sup>11</sup> and cited a Supreme Court case concerning an analogous question in connection with the Transportation Act of 1920.<sup>12</sup>

The Board also disposed of the petitioner's contention that the granting of a certificate by them on an experimental basis usurped an exclusive authority vested in the Postmaster General under the Experimental Air Mail Act.<sup>13</sup> Their main point was that the pertinent sections (1 and 2) had been repealed and that an accompanying amendment had been made to Section 405 (1) of the Civil Aeronautics Act by striking out references to sections 1 and 2 of the Experimental Mail Act, which indicated that the Board was now to have no restrictions against experimentation with the air mail service.<sup>14</sup> The amendment (Act of July 2, 1940, "Extending the jurisdiction of the Civil Aeronautics Authority (Board) over certain air

<sup>6</sup> Brief of Respondent, *Braniff* case, pp. 28-34.

<sup>7</sup> *Braniff Airways v. Civil Aeronautics Board*, 147 F. 2d 152, 153 (App. D.C. 1945).

<sup>8</sup> Brief of Respondent, *Braniff* case, p. 30.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.* at footnote 6.

<sup>13</sup> *Id.* at 32-34.

<sup>14</sup> *Id.* at 33.

mail services, and for other purposes,") could only extend the Board's authority in this one respect, as its only effect was to remove the former restriction against experimentation with air mail service which hitherto had been referred to the Postmaster General. Nothing in the amendment changed Section 401 (d) (2). Therefore the Board thought it followed that they must always have had this authority to experiment under Section 401 (d) (2) subject to this one limitation which was now removed.

Thus it can be seen that there was a sound basis upon which the court could base its decision. However, before drawing any more conclusions a few more of the cases where the Board granted experimental certificates should be considered.

The next indication that the Board would continue to follow this pattern came in 1944, in their *Investigation of Local, Feeder, and Pick-up Air Service*.<sup>15</sup> They concluded that they were justified, "within reasonable bounds," in allowing an experimental shorthaul operation even though they had little information of a factual nature. The applicants were fit and the public would be greatly benefited. Furthermore, they felt that the policy declarations of the act imposed upon them the responsibility to encourage new forms of air transportation when estimates and plans indicated that there was a good chance for their success. However, the Board did recognize that there was a basic conflict among the sections of the act which had to be taken into account and reconciled in some manner, when they pointed out that they had "an equal obligation to foster sound economic conditions in air transportation, and to promote efficient service at reasonable charges, . . ." <sup>16</sup> As a result they set up as a safeguard, requirements which must be met before they would issue any temporary certificate.

"Safeguards available for use in this connection appear to be: (1) the limitation of such authorizations to temporary periods, and (2) confinement of them to operations which show a justifiable expectation of success at a reasonable cost to the Government."<sup>17</sup>

Thus the foundation was laid for the decisions which became necessary at the end of the war when the Board was flooded with applications for certificates of all types of newly proposed services from the numerous pilots the war had created as well as the existing certificated air carriers.

The first of these post-war decisions came in 1946 and concerned local-feeder services in the Rocky Mountain States Area.<sup>18</sup> The Board authorized the local service on an experimental basis and again indicated that they thought the guiding principles in Section 2 of the Act allowed them to construe Section 401(d) (2) so as to permit experimentation. Fostering and encouraging "the development of an air transportation system adapted to the national needs and to encourage the development of civil aeronautics generally," <sup>19</sup> were thought by the Board to indicate this power in them. They felt that experiments of this type, limited to a three year period, would permit the development of actual traffic experience which at that time didn't exist and that this would serve as a guide at a future date to determine whether the services was justified within the standards of the Act. If it weren't, the Board would not grant a new certificate, or on the other hand, if it were, the Board might even allow additions to be made to the service.<sup>20</sup>

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<sup>15</sup> *Investigation of Local, Feeder, and Pick-Up Service*, 6 CAB 1 (1944).

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Service in the Rocky Mountain States Area*, 6 CAB 695 (1948).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Id.* at 730, 731.

As before, they recognized that there was a certain fundamental conflict in the policies as set out in Section 2, and indicated that a middle road would have to be followed by saying that it was incumbent upon them, "to provide certain safeguards for the over-all economy of our air transportation system and for the financial obligation of the Government in the form of mail compensation."<sup>21</sup> They then set out the same safeguards cited previously.

Next came the *Freight Forwarder* decision.<sup>22</sup> Here the Board under Section 1 (2) of the Act<sup>23</sup> issued a regulation allowing the air freight forwarders to operate without a certificate upon the procurement of letters of registration.

In the case of these Freight Forwarders, the Board thought it would be extremely difficult if not impossible to fix a route pattern in the manner contemplated under Section 401 and concluded that it would be more appropriate at that time to confer authority pursuant to Section 1 (2). Because of the indirect type of operation, they were able to avoid the requirements of finding public convenience and necessity which are omitted from this section of the Act. Thus, since it seemed clear that the next few years would constitute a period of experiment in air forwarding, they denied the application for a regular certificate. They believed the experiment could best be performed by granting this general relief order exempting forwarders from certain provision of the act under the provisions of Section 1 (2).

As a result the Board authorized the experiment, "until such time as the Board shall find that their operations are not in the public interest, but in no event longer than five years."<sup>24</sup>

Ultimately this resulted in the only other court decision to touch upon the subject, *American Airlines et. al v. Civil Aeronautics Board*.<sup>25</sup> In its opinion the court said the Board had found that the public interest in and the need of air forwarders had been sufficiently established to justify their operation for a limited period and from this experience a permanent policy could be soundly determined.

It then seemed to assume that the Board had this experimental power by saying:

"... We think it clear that it can not be said that the Board has failed to make adequate findings in this case, where it is dealing largely with an experimental undertaking."<sup>26</sup>

Although this certainly cannot be considered as a specific ruling on the point, it should be pointed out that the question of the power of the Board to conduct experiments was discussed and the Braniff case cited in both the Board's and the Petitioner's brief. Thus we know that the court was informed of the question and evidently must have concluded in their own minds that the power did exist. Surely it would seem that if they had felt the other court had been incorrect in its decision in the Braniff case they

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<sup>21</sup> Ibid.

<sup>22</sup> Air Freight Forwarder Case, CAB Docket No. 681, September 8, 1949.

<sup>23</sup> "... the Authority may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest. Section 1 (2), Civil Aeronautics Act of 1938, 52 Stat. 977, 49 U.S.C. 401.

<sup>24</sup> Air Freight Forwarder Case, CAB Docket No. 681, September 8, 1949 at p. 55.

<sup>25</sup> 178 F. 2d 903, (CAA 7, 1949).

<sup>26</sup> Id at 908.

would have ruled on the point. For the question was raised by both parties; and a ruling by the court against the Board's power to experiment would have changed the outcome of the case in favor of the Petitioners.

The most recent decision involving this problem is the *Air Freight Case* decided July 29, 1949.<sup>27</sup> There the Board in a case involving the certification of all-freight carriers, with no government subsidy through the carriage of mail, granted temporary certificates for a period of five years on an experimental basis. In this decision the Board said, among other things that, "Throughout the text of the Civil Aeronautics Act runs the unmistakable thread of this development objective."<sup>28</sup> It points out, as one example, that the Act says the mail rates are not to be fixed by the usual means with consideration being given only to what a fair and reasonable compensation for the services performed should be. Rather, due regard is to be given to the financial needs of the carriers in order, "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."<sup>29</sup>

They added that in the interests of national defense a, "need for an operating fleet of transport aircraft many times larger than that now in use by the certificated airlines," had been substantiated by the statements of, "high officials in military and civilian transport services," made during the proceedings.<sup>30</sup>

#### CONCLUSION

There seem to be several strong reasons for believing that the present interpretation of the Act is correct and will continue to be followed.

In the *first* place, there is now a long line of administrative decisions upholding the power of the Board to experiment. *Secondly*, the arguments in the Board's brief in the *Braniff* case concerning the change in the Air Mail Act indicate rather strongly that the Board must have had the power all the time. *Thirdly*, the recent decision in the *Air Freight Forwarders'* case certainly indicates that the court must have thought the Board had the power and that the *Braniff* case was correct. *Finally*, in view of the young, dynamic, and expanding nature of the industry with which the Act is concerned and the Declaration of Policy in Section 2, it seems only reasonable to believe that Congress meant to give the Board the authority to allow experiments to be made in new and untried methods of air transportation. Such authority is subject, of course, to a showing of substantial evidence indicating that the operation would probably be successful; and a finding of fitness on the part of the air carrier, and of public convenience and necessity. If these requirements are met there seems to be little reason for contending that the Board may not issue a temporary certificate for experimental purposes, and every reason for believing that its decisions will continue to be upheld by the courts.

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<sup>27</sup> *Air Freight Case*, CAB Order Serial No. E-3085 (July 29, 1949), Docket Nos. 810 et. al. and 730.

<sup>28</sup> Id at 28.

<sup>29</sup> Ibid.

<sup>30</sup> Id. at 33.

# EXCLUSIVE GASOLINE CONCESSIONS UNDER THE FEDERAL AIRPORT ACT OF 1946

AS a result of the recent change in the Administrator's rules promulgated under the Federal Airport Act<sup>1</sup> allowing exclusive gasoline concessions at airports receiving federal aid, the operating expenses of the airlines may be raised as much as fifty million dollars a year.<sup>2</sup> Formerly, as a prerequisite to federal aid, airport sponsors had to agree that the airlines could bring their own gasoline on the fields without paying entrance fees.<sup>3</sup> Under this arrangement the airlines could gain favorable contracts with gasoline companies. Now, however, this covenant has been removed from sponsors' contracts,<sup>4</sup> and exclusive gasoline concessions may be granted by the airfields. Since a rise in the price of gasoline of only one cent a gallon would result in an increase in operating expenses of over \$3,000,000 a year,<sup>5</sup> the airlines fear that the stifling of competition among the gas companies will push the price up.

The Federal Airport Act directs the Administrator to receive assurances "satisfactory to him" that airports receiving federal aid will be available for "public use" on "fair and reasonable" terms without "unjust discrimination."<sup>6</sup> In light of the legislative intent to encourage aviation and the language of the section, the airlines might argue that the administrator could not abandon a rule if it would result in fostering discrimination or increasing operating expenses.<sup>7</sup>

Since neither the Federal Airport Act nor the Civil Aeronautics Act<sup>8</sup> contain review provisions applicable to the Administrator, the airlines must turn to the Administrative Procedure Act for judicial relief.<sup>9</sup> Under this act there are three preliminary requirements to meet before review is possible: (1) the plaintiff must have suffered a "legal wrong," (2) the statute must not preclude review, and (3) the agency action must not be committed to agency discretion.<sup>10</sup>

<sup>1</sup> 60 STAT. 170, 49 U.S.C. §1101 *et seq.* (Supp. 1949).

<sup>2</sup> Based on going rates, according to Robert Ramspeck, executive vice-president of the Air Transport Association. *Am. Av. Daily*, May 9, 1949, p. 46.

<sup>3</sup> 14 CODE FED. REGS. §550.5(c) (1949).

<sup>4</sup> Regulations of the Administrator, §550.5(c) and §550.11(b)(3)4, 14 FED. REG. 2405, 2409 (1949).

<sup>5</sup> *Am. Av. Daily*, May 9, 1949, p. 46.

<sup>6</sup> 60 STAT. 176, 49 U.S.C. 1110 (1946).

<sup>7</sup> When applying the Sherman Act, 26 STAT. 209, as amended, 50 STAT. 693 (1937), 15 U.S.C. §1 *et seq.* (1946), control by municipalities must be considered before the action can be called an unreasonable restraint. The Act is not directed at local governmental bodies, but at combinations to restrain competition by individuals and corporations, *U.S. v. Yellow Cab Co.*, 69 F. Supp. 170 (N.D. Ill. 1946), *remanded* 332 U.S. 218 (1947), 80 F. Supp. 936 (N.D. Ill. 1948), *aff'd* 338 U.S. 338 (1949); *Parker v. Brown*, 317 U.S. 341 (1943). The airlines would have to overcome the reluctance of the federal courts to interfere with local government to prevail. This factor is not present in suits in the state courts, although many of the other considerations are the same.

<sup>8</sup> 52 STAT. 977 (1938), 49 U.S.C. §401 *et seq.* (1946).

<sup>9</sup> *City of Dallas v. Rentzel*, 172 F.(2d) 122 (5th Cir. (1949)). An attempt was made to force the Administrator of Civil Aeronautics to review an order of the CAB granting funds to Fort Worth. The court held that §§309, 1006 of the Civil Aeronautics Act, *supra*, as amended by §§459, 646(a), were not applicable as they dealt only with decisions of the CAB. Jurisdiction was then denied under the Administrative Procedure Act, 60 STAT. 243, 5 U.S.C. §1009(b) (1946), because it was not a court of competent jurisdiction.

<sup>10</sup> 60 STAT. 243, 5 U.S.C. §1009 (a) (1946). Professor Dickerson, however, does not accept this view. *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A.J. 434 (1947).

The task of determining whether the airlines have suffered a legal wrong when government contracts with third persons (airports) are altered is not an easy one, because the wrong suffered by the airlines, if any, is a relational injury. The courts have held both ways on this borderline situation,<sup>11</sup> and the ambiguous legislative history of the A.P.A. throws little light on the problem.<sup>12</sup>

Assuming, however, that a legal wrong has been suffered, the question arises whether a statute precludes review where, as in the Airport Act, there is no statutory provision for it. Before the passage of the Administrative Procedure Act absence of such a provision was often held to be fatal.<sup>13</sup> Although cases decided since the passage of the Act are in disagreement,<sup>14</sup> the legislative history seems to indicate clearly that Congress meant to allow review unless a statute explicitly withheld it.<sup>15</sup>

The problem still remains whether review will be denied because it is an exercise of discretionary power.<sup>16</sup> The Federal Airport Act directs the Administrator to make contracts "satisfactory to him" and thus commits the provisions to his direction. Prior to the Administrative Procedure Act the Supreme Court went so far as to say that a statutory term could have several "reasonable interpretations," and that the choice by an agency of any reasonable one would prevail.<sup>17</sup> The Administrative Procedure Act has not changed this<sup>18</sup> and the present temper of the court, as reflected by recent

<sup>11</sup> The airlines could cite in their favor the controversial *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), which said, "It is enough that the regulations . . . effect adversely appellant's contractual rights and business relations with station owners." *Contra*: *Perkins v. Lukens Steel*, 310 U.S. 113 (1940), which held: ". . . neither damage nor loss of income in consequence of action of the government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in absence of . . . legislation recognizing it as such."

<sup>12</sup> The House and Senate Committees gave a broad meaning to the term, H.R. Rep. No. 1980, 79th Cong., 1st Sess. 42 (1945); and Sen. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). *Compare* Sen. Rep. 43, where the Attorney General suggested the term "legal wrong" referred to the existing law, and cited *Perkins v. Lukens Steel*, 310 U.S. 113 (1940).

<sup>13</sup> For example, the court in *Switchman's Union v. National Mediation Board*, 320 U.S. 297, 303 (1943), held: ". . . if congress had desired to implicate the federal judiciary and to place on the federal courts . . . any aspect of the problem, it would have made its desire plain." The court in its determination of legislative intent noted that while the statute was silent concerning review of their question, review was provided for other orders. This is analogous to the fact that review is provided for the CAB and silent as to the Administrator.

<sup>14</sup> *Unger v. U.S.*, 79 F. Supp. 281 (E.D. Ill. 1948), and *Snyder v. Buck*, 75 F. Supp. 902 (D.C. D.C. 1948) have recognized an intent to change the law where the statute does not provide a review. *Contra*: *Kirkland v. Atlantic Coastline Railroad Co.*, 167 F. 2d 529 (D.C. Cir. 1948), declared that the law had been settled as to the Railway Labor Act by the *Switchman's Union Case*, *supra* note 13, within the meaning of the Administrative Procedure Act which meant existing law.

<sup>15</sup> Sen. Doc. No. 248, 79th Cong., 2d Sess. 229, 416 (1946); "A statute may in terms preclude judicial review, or be interpreted as manifesting a congressional intention to preclude judicial review." *Id* at 311, Mr. Austin pointed out to Mr. McCarran cases in which no redress was given because the statute did not provide a review and asked if the bill would remedy the defect, to which Mr. McCarran replied in the affirmative.

<sup>16</sup> *U.S. v. Bush & Co.*, 310 U.S. 371, 380 (1940); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-130 (1940).

<sup>17</sup> *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 131 (1944), the case turns upon the better ability of Administrators to solve a problem and their reasonableness in doing so.

<sup>18</sup> The House and Senate Committees seemed to fear a substitution of judicial for administrative discretion. Sen. Doc. No. 248, 79th Cong., 2d Sess., 212, 275.



cases,<sup>19</sup> favors wide discretionary powers in federal agencies. The Administrator's discretion, if not the problem of finding a legal wrong, or preclusion of review by the Acts, would probably force the airlines to seek relief through the state courts.

It has been suggested that the state courts offer a remedy against the cities, through the seemingly applicable old but well established law of franchises.<sup>20</sup> As a general rule a municipality has no implied power to grant exclusive privileges or franchises unless such power has been expressly conferred by the legislature.<sup>21</sup> It would thus seem that the express right to grant exclusive gasoline concessions would have to be given cities by their state legislatures before they could take advantage of the change in the Administrator's regulations. Nevertheless, three methods by which cities might claim they already have the right are: (1) the municipality is acting in a proprietary capacity; (2) the privilege is so necessary to carry out an express power as to leave its existence free from doubt; and (3) reliance upon a broad grant of power which inadvertently may be specific enough.

Where a city acts in a proprietary capacity, it may enter into the same exclusive contracts as a private corporation, since the rule against exclusive franchises applies only to governmental functions.<sup>22</sup> Aside from the fact that many states recognize the operation of an airport as a governmental function,<sup>23</sup> the policy reasons of comfort, convenience, and safety must be met before either a private corporation or a city acting in a proprietary capacity may enter into a monopolistic contract. This is the theory of cases which have upheld exclusive contracts by municipalities to transport passengers to and from railway stations.<sup>24</sup> These policy reasons do not favor exclusive gas concessions, for certainly the public's convenience and comfort would not be bettered if higher fares resulted. Neither would the safety argument of necessity of city control over a dangerous substance be valid, since there could be city control of movement and storage of gasoline purchased off the field by the airlines. In fact, a strong safety argument could be made in favor of separate sources of gasoline because of the difficulty in tracing a bad shipment of gasoline where using a common supply.<sup>25</sup> Even if a court does find the function to be proprietary, it probably will be difficult for a city to prevail on this theory because of the lack of a strong policy argument.

The municipalities might argue that no express grant of power was needed, if such power was so necessary as to leave its existence free from

<sup>19</sup> *Unemployment Comm. v. Liberty Mutual Co.*, 329 U.S. 143 (1946), and *Mr. Justice Rutledge's concurring opinion in Board of Governors v. Agnew*, 329 U.S. 441 (1946). In *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469 (1947) the court admitted the issue was more legal than factual, but allowed the agency's interpretation.

<sup>20</sup> 38 Opinions of the Attorney General of the State of Wisconsin 105 (March 15, 1949).

<sup>21</sup> *Freeport Water Co. v. City of Freeport*, 180 U.S. 587 (1901); 4 McQUILLON, MUNICIPAL CORPORATIONS §§1758, 1760 (2d ed. 1940).

<sup>22</sup> *Miami Beach Airline Service v. Crandon*, 159 Fla. 504, 32 S. 2d 153 (1947); *Bailey v. Philadelphia*, 184 Pa. 594, 39 A. 494 (1898).

<sup>23</sup> This is of little consequence, since the courts could still say that this particular aspect of operating an airport is proprietary.

<sup>24</sup> *Miami Beach Airline Service v. Crandon*, 159 Fla. 504, 32 S. 2d 153 (1947); and 15 A.L.R. 356 discussing railroad station cases.

<sup>25</sup> A discussion of the problems encountered at Washington National Airport during the war when there was but one source of supply for gas appears in *Hearings Before Committee on Interstate and Foreign Commerce on H.R. 9738*, 80th Cong. (1948), a bill concerning exclusive gasoline concessions (which failed).

doubt.<sup>26</sup> Where the safety of the public is involved, it has been held that municipalities may grant exclusive franchises under general powers delegated to provide for the health and safety of their inhabitants.<sup>27</sup> But since the safety argument runs into trouble, the cities might fare better by asserting that no express grant of power by the legislature is needed to give them power to confer exclusive gasoline concessions. Such power is so necessary as to leave its existence free from doubt on the ground that the revenue is necessary for the airport to break even. However, the airlines might reply that recent surveys have shown that larger airports where the airlines buy most of their gas are breaking even without revenue increases from exclusive gas concessions.<sup>28</sup>

The difficulty encountered in most state statutes in trying to find a provision that might be construed as an express grant of power for exclusive gas concessions is that the state aeronautic and airport acts were based upon or made to conform with the federal acts and the Administrator's rules. Nevertheless, cities in Illinois are given a general grant of power to "grant concessions" for the servicing of airplanes,<sup>29</sup> and servicing could easily be interpreted now to mean the supplying of gasoline. While in New York airports may "sell" gas, no right is expressly given to sell exclusively.<sup>30</sup> The wording of statutes of other states gives many of them, Pennsylvania for example,<sup>31</sup> sufficient express power to have exclusive concessions.

The airlines will thus be unable to get relief in many state courts merely because by pure chance their statutes were drawn so broadly as to allow an interpretation which permits airports to have exclusive gasoline concessions. The policy reasons regarding aviation gas taxes, are the same as for these concessions, and some 29 states completely exempt or refund taxes on aviation fuel.<sup>32</sup> Many of these same states are now inadvertently saddling the airlines with an expense the same as that which they expressly wished to avoid.

In seeking judicial relief from the Administrator's sanction, the airlines are beset with procedural obstacles in the federal judiciary. In some of the state courts the airlines will be able to block exclusive concessions under franchise laws, but many state statutes are susceptible of an interpretation allowing concessions. If state legislatures fail to remedy this inconsistency with the policy of their aviation gas tax statutes,<sup>33</sup> perhaps competition with airports where airlines may furnish their own gas will tend to keep the price down. The fact that some airlines are now operating in the black, however, should not be the signal to throw open the barriers to possible abuses of this infant industry.

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<sup>26</sup> *Parkhurst v. Capital City Ry. Co.*, 23 Or. 471, 32 P. 304 (1893); 4 McQUILLAN, *MUNICIPAL CORPORATIONS* §1758 (2d ed. 1940).

<sup>27</sup> *Consumers Co. v. Chicago*, 313 Ill. 408, 145 N.E. 114 (1924); 3 McQUILLAN, *MUNICIPAL CORPORATIONS* §962 et seq. (2d ed. 1940).

<sup>28</sup> 16 *Municipal Yearbook* 317-323 (1948); and *Am. Av. Daily*, Jan. 20, 1950, p. 97.

<sup>29</sup> ILL. REV. STAT. c. 24 §22-7(3) (1949).

<sup>30</sup> A power to grant concessions is given, but modified in very general terms in N. Y. PUBLIC AUTHORITIES LAW §1447(13) (1949) (New York City Airport Authority Act); also the power to "purchase and sell gas" and to "charge for . . . services, concessions . . .," is given, N. Y. GENERAL MUNICIPAL LAW §352(3) (4) (1949).

<sup>31</sup> Pa. Stat. tit. 2, §1503 (d) (1948). Also see Mass. G.L. c. 90, §§51i, 50f (1948).

<sup>32</sup> Resolution adopted by the North American Gas Tax Conference on Sept. 15, 1948. Seven states taxed gasoline at the regular rate and thirteen at some fraction of that rate. *Arditto, State and Local Taxation of Scheduled Local Airlines*, 16 J. Air L. 162 (1949), discussed the problem.

<sup>33</sup> California has, Cal. G. L. c. 151a, §7(1) (1949).